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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-5932

JOHN DOE and JANE ROE,

Appellants,

v.

THE STATE OF DELAWARE,

Appellee.

BRIEF FOR APPELLEE STATE OF DELAWARE

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ON APPEAL FROM THE SUPREME COURT OF DELAWARE

QUESTIONS PRESENTED FOR REVIEW

1. Was a now repealed Delaware statute which predicated termination of parental rights on dual findings of parental unfitness and the best interest of a child impermissibly vague under the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Do children have an independent constitutional right to representation in termination of parental rights proceedings? [1]

3. In non-penal actions like termination of parental rights proceedings is some greater standard of proof than a preponderance of the evidence required?

4. Must termination of parental rights statutes be measured by the compelling state interest test under the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

1. This question was not raised by appellants rather it has been interjected by the *amici*.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The former 13 *Del. C.* § 1103(4) under which this case was decided is set out in Appendix A to this brief. The current statute, 13 *Del. C.* § 1103(5), governing termination of parental rights proceedings is set out at Appendix B to this brief.

STATEMENT OF THE CASE

John Doe and Jane Roe, appellants, are the natural parents of the five minor children who are the focus of this matter.[2] The appellee Division of Social Services (Division) has the duty to seek out minors in need of care and protection in Delaware. 31 *Del. C.* ch. 3.

On several occasions in the years prior to the institution of TPR proceedings in 1975, the Family Court of the State of Delaware awarded legal custody of Doe and Roe's children to the Division. Finally after a full five day hearing at which evidence was adduced concerning the family's chaotic and nomadic home environment, Doe's poor employment record, his criminal record and history of alcohol problems, as well as Roe's emotional detachment from the children, the Superior Court terminated Doe and Roe's parental rights having found them unfit parents and having concluded that such action was in the best interests of Amy, Bill, Charles, David and Ellen.[3] The Delaware Supreme Court affirmed.

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2. Doe is the half-brother of Roe. Although not married, they lived together and held themselves out to the community as husband and wife (Roe was known as Mrs. Doe) at all time relevant to this action. Their children Amy, Bill, Charles, David and Ellen ranged in age from four years to nine months old when the TPR (termination of parental rights) action was filed in 1975. These children are now nine to five and a half years of age. They have not had any contact with their parents since 1975. Roe is now married to another man and lives with his child in Delaware. Doe presently lives in Georgia. He has not lived in Delaware for more than two years. All that Doe and Roe presently seek is "contact" with their children. See Affidavits of Doe and Roe in Support of Motion to Proceed in Forma Pauperis in this action.

3. The Superior Court previously had entered an order terminating parental rights solely on the basis of Doe and Roe's criminal incestuous relationship. The Delaware Supreme Court remanded with directions to consider whether termination was "in the best interests of the children."

The Division had a long history of providing supportive services to the Doe family. Early in 1972, Doe asked the Division to help find a place for Roe, Amy, and him to live.[4] After the birth of Bill, Doe and Roe asked the Division in September 1972 to provide a "decent home" for the children.[5] Doe had been fired from his job and the family had been evicted from its home and was living in a single room at a roominghouse.[6] On occasion, both before and after September 1972, Doe and Roe received public assistance (even at times when their children were in foster care).[7] When they were initially denied cash assistance in September 1972, their social worker made arrangements for Doe to have a fair hearing to challenge the denial.[8] After the Family Court approved the voluntary transfer of custody agreement, the children were placed in foster homes where they remained for about six months.[9] When Doe and Roe brought their marital difficulties to the attention of the Division they were referred to the marriage counseling service at Catholic Social Services.[10]

While Amy and Bill were in the Division's custody, Doe became intoxicated. He was violent and disruptive and, according to a complaint filed by Roe, threatened to kill her and accused her of running around with other men. As a result Doe was admitted to the Delaware State Hospital for treatment. After ten days, Doe signed himself out of the hospital. He was given medication and

4. Tr. 58.

5. Tr. 64.

6. Tr. 122-123.

7. Tr. 496-497.

8. Tr. 125-126.

9. Tr. 129.

10. Tr. 124.

referred to out-patient services at the mental hygiene clinic near his home but only kept one appointment.[11]

The Division continued its frequent contacts with Doe and Roe after Amy and Bill were placed in foster care,[12] visiting them several times a month and working with them so that the children could be returned to their home as soon as possible. After the Does made adequate housing arrangements, Amy and Bill were returned home in early 1973.[13] Doe had found new employment and the family was renting a "nice" home.[14] A week after Amy's return Doe quit his job, found another from which he was soon fired, and the family moved from the home in the middle of the night.[15] Doe then found work on a local dairy farm and the family moved into a tenant's cottage on the farm. While the house was "fairly decent" and adequate for the Does, their sister, her four children and her boyfriend moved in with them. The three bedroom house then accommodated two couples and six young children.[16] Within a month to six weeks Doe was fired for being unreliable. His employer could not depend on him to get in on time to milk the cows.[17]

The Does continued to drift from one abode to another, usually living in minimally adequate to poor housing. Between 1972 and 1974 alone, they lived in

11. Tr. 62-63, 184.

12. Tr. 123-124. The social worker observed that the Does "didn't seem overly concerned about the placement of the children." Tr. 123.

13. Tr. 129.

14. Tr. 128.

15. Tr. 130; 142-143.

16. Tr. 130-131.

17. Tr. 66-70; 117-118.

nineteen separate locations in eleven different towns.[18] During that period Doe worked only intermittently.[19] He held several jobs for periods between one day and two weeks.[20] Doe was discharged at times for drunkenness.[21] Other times he quit for no apparent reason and without another job prospect. He quit one job just after the birth of Charles, the third child.[22] Doe left other jobs at times when he lacked the money to pay the family's rent.[23]

Due to Doe's sporadic employment record the family was often in dire financial need.[24] The Division, in addition to providing public assistance on several occasions, periodically arranged for emergency cash assistance so that they could purchase food or assisted them in obtaining food from other sources.[25]

In 1973 three individuals familiar with the Doe's home life, including one of their sisters with whom they had shared living quarters, volunteered to Doe's social worker that he had been sexually toying with two year old Amy.[26] The Division petitioned the Family Court of Delaware to remove Amy, Bill and Charles from the home. That petition was granted.[27] A criminal complaint alleging sexual assault was filed against Doe. He and Roe then fled to Maryland. During their four month

18. Tr. 141-142.
19. Tr. 65; 79-82; 87.
20. Tr. 141-143; 189.
21. Tr. 142; 184.
22. Tr. 185.
23. Tr. 182.
24. Tr. 71; 85.
25. Tr. 132.
26. Tr. 155.
27. Tr. 136.

absence from Delaware neither Doe nor Roe inquired about the welfare of their children.[28] After a trial, the Family Court convicted Doe of the lesser included crime of offensive touching and of the crime of child neglect.[29] The Does continued to live in Maryland for about a year after Doe's conviction and they made one contact with Amy, Bill and Charles during that period.[30]

After a while the Doe's returned to Delaware with their infant twins David and Ellen. In February 1975 custody of those children was granted to the Division after Doe was convicted of the crime of incest.[31]

The Division social worker who worked closely with the Does between 1972 and 1974 concluded on the basis of her observation of Doe and Roe, that they simply lacked the capacity to provide their children with basic care. She noted that Roe never demonstrated a strong emotional attachment with her children.[32] That observation was confirmed by another social worker who described Roe's relationship with her children as "detached".[33] The only strong familial attachment which

28. Tr. 138.

29. Tr. 77; Two witnesses testified at the Family Court trial that Doe repeatedly had "French kissed" Amy over her verbal objections and one of these witnesses also testified that he had directed this two year old on many occasions to expose her vaginal area and encouraged her to engage in acts of sexual self-gratification. Ex. 24 to TRP hearing. Tr. 515. An expert child psychologist who testified at the TPR hearing stressed the harmful effects on the child when a parent fails to channel and help his child sublimate infantile sexual urges. Tr. 17-18; 30-32.

30. Tr. 79.

31. Tr. 91; 111.

32. Tr. 140.

33. Tr. 168.

the Division was able to observe existed between Doe and Amy. That relationship was characterized as "unhealthy," though.[34]

Testimony of three expert witnesses at trial definitively established that Doe and Roe were incapable of adequately caring for their children and that it was in the children's best interests that the termination petition be granted. Adaline R. Kinkaid, a psychologist, observed and tested the five children of Doe and Roe. She determined that Amy, the oldest child, was frightened and insecure and still bore the scars of her earlier experiences. However, Amy had been able to form a psychological bond with her foster parents and was secure in her present foster home.[35] Miss Kinkaid and the two psychiatrists who testified at the trial agreed that Amy's poor abilities in the area of social skills contrasted sharply with her average to superior intellectual abilities.[36]

Bill was found to have overcome his difficulties and was not as emotionally damaged as Amy, who spent more years in the home of Doe and Roe than her siblings.[37] Charles, who was mildly retarded, appeared to be settled in his present home but lacked the ability to adjust to further changes. David and Ellen, the twins who had lived most of their lives in foster homes, were characterized as normal children whose needs were being met in their present environment.[38]

Dr. T. Richard Huxtable, Jr., Chief of Forensic Psychiatry at the Delaware State Hospital, concluded that

34. Tr. 140.

35. Tr. 238.

36. Tr. 29; 186; 237.

37. Tr. 238.

38. Tr. 239.

Doe and Roe were incapable of raising children.[39] He characterized Doe as a "sociopath" who lacked a sense of responsibility to a degree that was "overwhelming".[40] Both Dr. Huxtable and Dr. Charles Cook, a child psychiatrist, ascribed the lessening of appellant's chronic pattern of instability to the fact that they were no longer subject to the stresses of parenthood.[41] Dr. Cook determined that Doe and Roe lacked the capability to function as nurturing parents as well as the ability to develop adequate parenting skills.[42] He described the environment which appellants had provided their children as "chaotic."[43]

As appellants indicate, Dr. Malvin Gelof, a psychologist, expressed his belief that Doe and Roe were sufficiently intelligent to raise children.[44] He could not, however, explain why appellants had not been able to provide less than chaotic environment for their children in the past nor whether a termination order would be in the children's best interests.

After this evidence was considered by the Superior Court, it concluded that Doe and Roe were incapable of providing proper care for their children, citing the parents' employment records, the frequent changes in home surroundings, the moral atmosphere of the home where the criminal incestuous relationship continued in contravention of the order of the Family Court and the offensive

39. Tr. 182.

40. Tr. 187.

41. Tr. 35-36; 196.

42. Tr. 20. Dr. Cook testified that the geographic and emotional instability of the Does indicated an inability to provide the nurturance and stability required for even average human infant development. Tr. 15-17.

43. Tr. 30.

44. Tr. 457.

touching conviction of Doe for toying with Amy. In their totality these facts provide ample evidence to support a finding that termination was in the best interests of the children. These same facts show Doe and Roe's unfitness to continue to exercise parental authority over the children. The Delaware Supreme Court did not err in affirming the judgment of the trial court in terminating Doe and Roe's parental rights under the former statute.

With the repeal of former 13 *Del. C.* § 1103(4) and the enactment in 1980 of a new statutory standard for termination of parental rights which requires a showing of failure to plan adequately for the child's physical needs or mental or emotional health, of a prior placement history, and that there is little likelihood that the conditions which resulted in the child's placement will be remedied (13 *Del. C.* § 1103(5))[45] the facts described above would still compel termination. Despite the parents' showing a relative stability during the year when they were without custody of any of their children, that very stability was attributed by Drs. Huxtable and Cook as resulting from the parents ability to relate to each other in the absence of any and all of their five children[46] whose presence always seemed to reintroduce the pressures of child rearing with which they were unable to cope.

The parents' continuing interest in their children has been tenuous indeed and the legal operation of freeing the five children who have not seen their parents since 1975 so that these children may be legally made part of the adoptive homes in which they have lived in the interim is an interest which should not be disregarded by the Court because the parents, no longer living together nor in the same part of the Country, seek to reestablish "con-

45. See Appendix B.

46. See footnote 41 *supra*.

tact" with the children, whatever that may be. At oral argument of this case before the Delaware Supreme Court in 1978 counsel for the parents acknowledged to that Court that he did not know where the parents were located. Only with the filing of the Motions to Proceed in Forma Pauperis in this Court has counsel for the parents been able to identify their locations. And now they ask for "contact". The Division asks that the decision of the Delaware Supreme Court be affirmed so that adoption proceedings which have been held in abeyance pending final disposition of the matter may go forward and these children may have more than simple "contact" with biological parents whom they have not known for five years and may be allowed to become full members of the loving and nurturing adoptive families with whom they have lived since prior to the TPR hearing.

SUMMARY OF ARGUMENT

The former Delaware TPR statute (13 *Del. C.* § 1103(4) repealed) was not unconstitutionally vague. It required a showing of parental unfitness as well as a demonstration that the termination of parental rights was in the best interests of the child or children involved. This dual test, long followed in Delaware, was recognized by this Court in *Quilloin v. Walcott,* 434 U. S. 246 (1978). The standards are phrased in common language not beyond the understanding of the average parent and certainly are not so technical that a reasonable parent or custodian would be left adrift in his efforts to comply for the purpose of raising his children. Furthermore the Delaware Supreme Court recognizing, as do the parents here, that each case is fact specific has enumerated criteria for testing the application of the statutory standard. *See, e.g. In re Dingee,* 328 A. 2d 139 (Del. 1974). Due Process does not compel a perfect statute; it simply requires one which is capable of being understood by those who it covers and who must apply it. The former Delaware TPR statute satisfied those requirements.

The children here involved have no constitutional right to independent representation now in this Court for the first time in these proceedings. Nor did they have a constitutional right to counsel or the appointment of a *guardian ad litem* in the State court proceedings. As a practical matter, developments in procedure and the Division's practices since the trial of this matter in 1976 now assure the appointment of a *guardian ad litem* in abuse and neglect proceedings in the Delaware Family Court. Delaware has also institutionalized by statute a foster care review procedure which will ensure that an independent entity with the power to institute actions before the Delaware Family Court will review and make placement recommendations for children in foster care.

Extraordinary standards of proof should not be required in TPR proceedings because they are not penal in nature and because the balancing of the competing interests of the child requires that he not be the forgotten element in the equation. He is not the prize awarded to the victorious party. Rather, he is the person in whose interests the action itself is brought. To require the State to show unfitness beyond a reasonable doubt, as the parents argued in the State Courts, or by clear and convincing evidence penalizes the child who should not be shackled to a family relationship of "contacts" only like this one apparently will be.

Finally, there is no substantive due process consideration which should impell this Court to require as showing of a compelling state before a state interest may finally separate the parents and their children. The State has a legitimate interest in severing the family relationship where such is necessary to protect the welfare of the child. Furthermore, to require that a showing of imminent and significant harm to the children be made to justify termination proceedings strips these defenseless individuals of any real opportunity of receiving protective services from the State and final placement in a nurturing environment where they can belong to a family without fearing for their physical and emotional well being.

ARGUMENT

I. The Former Delaware TPR Statute Was Not Unconstitutionally Vague or Indefinite.

It is axiomatic that a state must tread carefully when it seeks to alter the integrity of the family.[47] Nonetheless, it is also well established that neglectful parents may be separated from their children. *Stanley v. Illinois,* 405 U. S. 645, 652 (1972). Here, substantial evidence has established that the interests of the parents in retaining parental rights is inimical to the "best interests" of these children. Proof of both parental unfitness and the fact that termination lies in the best interests of the Doe and Roe children clearly satisfies the requirement of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In *Quilloin v. Walcott,* 434 U. S. 246, 255 (1978), this Court cited an earlier concurrence by Mr. Justice Stewart which set forth the following dual proof requirement in cases such as this one:

> We have little doubt that the Due Process Clauses would be offended "(if) a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families,* 431 U. S. 816, 862-863, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977).

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47. Appellants and *amici* cite the Court to a series of cases which restrict state intrusion into family life. However, none of them reflect the central familial issue in a TPR proceeding, the inherent conflict between the interests of the parents and the children. *Compare* Quilloin v. Walcott, 434 U. S. 246 (1978) (statute declares unwed fathers unfit as matter of law); Prince v.

The dual fitness/best interests test had become a settled principle of Delaware TPR law long before *Quilloin* and *Smith*.[48]

The Delaware Supreme Court has been careful to explicate these terms so that they are comprehensible by parents and their application by the trial court cannot be

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47. (Cont'd.)

Massachusetts, 321 U. S. 158 (1944) (statute prohibits minor's sale of religious literature); Cleveland Board of Education v. LaFleur, 414 U. S. 632 (1974) (school regulations require early termination of pregnant teachers); Moore v. East Cleveland, 431 U. S. 494 (1977) (ordinance prohibits extended families in single family dwellings); Wisconsin v. Yoder, 406 U. S. 205 (1972) (mandatory school attendance laws conflict with religious principles); Pierce v. Society of Sisters, 268 U. S. 510 (1925) (school attendance laws preclude parochial school attendance); Meyer v. Nebraska, 262 U. S. 390 (1923) (state law prohibits teaching in German language).

48. Parental unfitness has been statutory ground for protecting children since 1907. In re Three Minor Children, 406 A. 2d 14, 16 (Del. 1979). Both unfitness and the best interests must be shown in a TPR. Cline v. Hartzler, 227 A. 2d 210 (Del. 1967). The best interest factor in TPR's is presently codified at 13 *Del. C.* § 1113. The best interest test has been applied consistently by Delaware courts when dealing with issues affecting the custody and control of children. *See e.g.* Smith v. Smith, 45 A. 2d 879 (Del. Super. 1946) (custody; good of child is "primary or leading consideration"); In re Fusco, 127 A. 2d 468 (Del. Orph. 1956) (TPR; "best welfare of the child is the paramount concern"); Nelson v. Murray, 211 A. 2d 842 (Del. 1965) (custody; "paramount concern is the present and future welfare of the children"); In re Two Minor Children, 231 A. 2d 475 (Del. 1967) (visitation; best interest of children is "primary consideration"); In re E., 239 A. 2d 626 (Del. 1968) (TPR; best interests of child is "prime and overriding concern."). In re One Minor Child, 295 A. 2d 727 (Del. 1972) (visitation; best interests of child supersedes "desires of parents.").

arbitrary. In doing so, the Delaware Supreme Court has ensured that the evils in the statute of which appellants complain: failure to give adequate warning of proscribed conduct and standardless and discriminatory application, cannot occur. Assuming *arguendo* that the statutory language is unconstitutionally vague on its face, that imprecision may be cured by narrowing court interpretations. *Lake Carriers' Assn. v. MacMullan,* 406 U. S. (1972).

The Delaware Supreme Court has held that the common, ordinary dictionary meaning of the statutory phrase "not fitted" should be used in applying the TPR statute. "[A]s to matters pertaining to custody of children [the words 'not fitted'] are to be read generally as meaning 'unfitted for parental duties'." *In re Dingee,* 328 A. 2d 139, 140 (Del. 1974). Furthermore, the Delaware Supreme Court twice has cited with approval the following standards adopted in *Clarke v. Lyon,* 82 Neb. 625, 633, 118 N. W. 472, 475 (1908): a) concern the parent has shown in the past for the children; b) the suitability of the parents' domestic surroundings to receive the children; and c) the children's general welfare. *In re Dingee, supra; In the Matter of Three Minor Children,* 406 A. 2d 14, 17 (Del. 1979). Additionally, the Delaware Supreme Court held below that:

> Unfitness cannot be based on poverty and lifestyle which do not reflect a lack of concern for and ability to care for the children or an unwillingness to receive the children as part of a family. *In the Matter of Five Minor Children,* 407 A. 2d 198, 200 (Del. 1979).

The difficulty in drawing an absolute statute which could cover all examples of parental unfitness, a problem highlighted by the Delaware Supreme Court in *Dingee* and *Five Minor Children,* is patent when one looks to

the statutes to which appellants point as examples;[49] to their own admission that there is "no slide-rule calculation" for determining unconstitutional vagueness;[50] to an *amicus'* recognition of the flexibility and reasonable breadth which must be permitted to exist in the child welfare context[51] and to the generality of the "standards" urged on this Court by another *amici*.[52] All reinforce the wisdom and the constitutional acceptability of the former Delaware TPR statute.

That the new statute, 13 *Del. C.* § 1103(5) set out in Appendix B, serves to address some of the principal objections of the parents and *amici* here does not damn the former statute. Standing on its own, former 13 *Del. C.* § 1103(4) under which the parental rights of Doe and Roe were terminated almost five full years ago satisfied Due Process standards. The future of these children

49. Appellants contend e.g. that the Michigan legislature has successfully managed to give explicit guidance to parents in its child custody statute. Mich. Comp. Laws Ann. § 722.23 (Supp. 1976). A close examination of the Michigan scheme, however, demonstrates its necessary lack of specificity. If Doe and Roe concede the appropriateness and acceptability of the Michigan law (a custody statute), they cannot attack the Delaware TPR statute. The Michigan law is replete with terms which necessarily require judicial explication. The terms "other emotional ties", "satisfactory environment", "moral fitness", and "mental health" which are in that statute are clearly not explicit. The final factor to be considered by the Michigan domestic courts, i.e. "any other factor considered by the court to be relevant," is an emphatic endorsement of the holding of the Supreme Court of Delaware in this case.

50. Brief for Appellants p. 24.

51. Brief for the Legal Aid Society of the City of New York, Juvenile Rights Division, as Amicus Curiae p. 25.

52. *See* Argument III in Brief of American Orthopsychiatric Assn., et al., as Amicus Curiae.

wedded as inexorably as it is to their past should not be disregarded unless there is no doubt in this Court's opinion that the former TPR statute was vague and the best interests of these five children can be vindicated by such a declaration.

Nor is the "best interest" standard impermissibly imprecise. In fact, the Delaware Supreme Court has suggested that the relevant factors in a custody proceeding provide a good basis for assessing the "best interest" of a child in a TPR setting. *In the Matter of Three Minor Children,* 406 A. 2d at 19. These relevant factors include: the interaction and interrelation of the child with his parents, his siblings and others who may significantly affect his interests; the child's adjustment to his home, school, and community; and, the mental and physical health of the individuals involved. *See* 13 *Del. C.* § 722 (a). The application of those factors here confirms the result of the trial court.

Similarly flexible statutes couched in commonly understood language have been upheld in other jurisdictions. In *Matter of Keyes,* 574 P. 2d 1026 (Okla. 1978), the Supreme Court of Oklahoma upheld a statute which permitted termination if a parent:

> [F]ailed to give the child parental care or protection necessary for his physical or mental health. 10 O. S. 1971, § 1130A. (3)(a).

The Court was "not persuaded by the *Alsager* case . . . nor the reasoning of *Roe v. Conn.* . . ." *Id.* at 1029. Similarly, the Texas Court of Civil Appeals in *Sanchez v. Texas Department of Human Resources,* 581 S. W. 2d 260 (Tex. 1979) specifically refused to follow *Alsager* in reviewing a TPR appeal.

Other state courts have rejected vagueness attacks on statutes because their respective TPR laws provide basic

standards which the "average intelligent person can understand" [53] or which can be "commonly grasped." [54] Some state courts which rejected vagueness challenges prior to *Alsager* were not swayed by the same rationale.[55]

The almost universal refusal to follow *Alsager* is recognition that:

> . . . [U]nlike criminal statutes in which the interests of only one set of individuals is involved, the constitutional issue must be examined with the interests of both the child and the parents. What might be unconstitutional if only the parents' rights were involved is constitutional if the statute adopts legitimate and necessary means to protect the child's interests. *State v. McMaster,* 259 Ore. 291, —, 486 P. 2d 567, 569 (1971).

The cases upon which the parents rely simply do not stand the tests of constitutional requirement, logic, or practicality. The Division agrees with the Court in *Alsager v. District Court of Polk County, Iowa,* 406 F. Supp. 10 (S. D. Iowa 1975) [56] that "Citizens should be able to guide their conduct by the literal meaning of phrases expressed on the face of statutes." at 18. Beyond that correct statement, which was followed in Delaware in this very case, the *Alsager* court required a higher standard in application. There are no "multifarious mean-

53. Matter of D. T., 89 S. D. 590, 596, 237 N. W. 2d 166, 169 (1975); In re William L., 477 Pa. 322, 383 A. 2d 1228, cert. denied 439 U. S. 880 (1978).

54. In re Metteer, 203 Neb. 515, 279 N. W. 2d 374 (1979).

55. E.g., In re Cager, 251 Md. 473, 248 A. 2d 384 (1968); State v. McMaster, 259 Ore. 291, 486 P. 2d 567 (1971).

56. Roe v. Conn., 417 F. Supp. 769 (M. D. Ala. 1976) adds nothing substantive to the Alsager discussion.

ings" (*Id.*) with which the parent must contend in the former Delaware statute. If the phrase "unfit to exercise parental duties" is complex or not easily comprehended by persons of average intelligence it is not because the terms are standardless. If one is unable or unwilling to provide for the care, nurtuance, medical and emotional needs of one's children no reasonable man would argue that the parent should retain custody and control of his child to that child's detriment. If, as in this case, the pattern of failure to plan and provide for the children is repeated over time with several children, the parents should not be able to hold some tenuous thread of control over the future direction of the children's lives. These children deserve some final and permanent "family" within which to grow and prosper as whole human beings and full citizens of our State and Nation.

As noted above, the Delaware Supreme Court had interpreted the former TPR statute in such fashion, that even if it had been facially defective, it was clarified to the extent that reasonable guidelines were articulated for its application. The Delaware Supreme Court took great pains to make it clear that neither poverty nor unconventionality were themselves grounds for termination thus further restricting any subjectivity which a trial court might otherwise thoughtlessly exercise.

Contrary to the parents' assertions, application of the *Alsager* standards will not protect family integrity as this case so clearly shows. Doe and Roe exhibited little interest in their children while they were in their custody and even less after the children were placed by the Division. At one point prior to the institution of any termination proceedings Doe and Roe simply disappeared for four months. Since the termination proceedings were instituted, they have shown only a fleeting interest in the children. There have been no contacts initiated by the parents

in years. The children have not seen their biological parents for five years (the youngest are under six years of age). At oral argument before the Delaware Supreme Court in 1978 the parents' counsel did not know where they were. What would have happened to the five children had the Delaware Supreme Court found in their parents favor? To whom would they have been returned? Now all the parents ask is to have "contact" with the children. What does that mean for these parents and these children? We submit it does not mean that the parents have any affirmative desire to reestablish the family unit. Doe lives in Georgia. Roe is married and is raising her husband's child. What will happen to the bonds of familial affection which the parents and *amici* tout in their briefs? Nothing; as a practical matter nothing will happen and these five children may be wrenched from families with whom they have spent considerable time and with whom they may spend the rest of their lives in reality experiencing the bonds of familial affection, albeit not in a biological family and placed in some form of long term foster care.

II. Children Do Not Have an Independent Constitutional Right to Representation in Termination of Parental Rights and Proceedings.

The various *amici curiae* have raised an argument not raised before in prior proceedings in this action, that the children here should be accorded separate representation either through the appointment of an attorney or a *guardian ad litem*.[57]

While the Division is not philosophically opposed to independent representation of children in TPR proceedings

57. Brief of the Legal Aid Society of the City of New York, Juvenile Rights Division, argument 1; Brief of National Association of Counsel for Children et al., argument 1; Brief of American Civil Liberties Union, argument II.

it is fair to say that, despite the activity of *amicus* Juvenile Rights Division of the Legal Aid Society of New York, the concept is of relatively recent origin on the national level and certainly was not in practice on any national scale while this case was being litigated in the trial court in 1975 and 1976. Today, in keeping with its policy, the Division itself would petition for the appointment of a *guardian ad litem* to represent the interests of the children in any TPR proceeding in which abuse or neglect was an issue. Should this case be remanded the Division would not oppose the appointment of a *guardian ad litem* to represent the interests of the children. However, the Division does not accept *amici's* argument that such an appointment is or was constitutionally mandated nor that it would be helpful to the children or this Court at this stage of the proceedings.

Each of these children has been in the custody of the Division since a very early age. None has seen his parents for over five years. The termination proceedings were commenced in 1975 and completed the following year. It was at that time that a *guardian ad litem* could have functioned effectively for these children. To now hold that those hearings were constitutionally deficient because of the absence of a *guardian ad litem* would as surely upset the present delicate balance of these children's lives as would voiding the proceeding because the statute under which the termination was effected was not as precise as the parents would desire.

The *amici* would have this Court mandate the appointment of an independent counsel/*guardian ad litem* not from any clearly articulated constitutional requirement but because they oppose and castigate the operation of foster care alternatives.

However, unknown to or undiscovered by *amici* are the salutory provisions of the Foster Child Review Act, 31

Del. C. c. 38 (repeated at Appendix C of this Brief). Rather than condemn children in foster care to an indeterminate limbo, the Foster Child Review Act provides for regular review of foster care placements by a panel of persons unconnected with the Division or placement agencies. The Foster Child Review Board may initiate an action in Family Court to enforce its placement recommendations. Such recommendations may include returning a child to his parents, initiating TPR proceedings, or providing for long term foster care plans if no other alternative appears to be in the best interests of the child. In light of this extensive independent review procedure and the absence of any evidence on the record to suggest the Delaware simply kidnapped these children or others the sociological arguments advanced by the *amici* must be disregarded insofar as Delaware and this case are involved.

Nor are there any reasons articulated in this Court's decisions which would compel the appointment of a counsel/guardian for the child. In *In re Gault*, 387 U. S. 1 (1967) the significance of the rule calling for the appointment of counsel lay in the penal nature of the "civil" action. In *Gault* the proceeding was directed against the child and but for his tender years the complaint would have been tried in the State's criminal courts. This is not the case here. There are no criminal or quasi-criminal charges pending against the children, rather the State is taking an action which is a condition precedent to placement of the children in normal, stable, nurturing family homes. That the State may act *parens patriae* in the interests of its children was recognized by this Court as recently as *Parhem v. J. R.*, 442 U. S. 584 (1979). In that case, the State was permitted to "voluntarily" commit its wards to mental institutions for medical treatment so long as the commitment was reviewed by a non-law

trained independent fact-finder who had the authority to refuse the admission. Here the child's procedural protections are even greater. Prior to the termination an evidentiary hearing must be had before a judge who may deny the Division's application or stay it pending further factual developments as in the companion case of *Able and Able v. The State of Delaware,* No. 79-6370, Jurisdictional Statement filed May, 1980. There has been no showing of bad faith on the State's part by the parents. The record amply discloses the State's continuous efforts to assist the parents before the TPR proceedings were instituted. Given that the record does not disclose any evidence showing that the State was acting for reasons unrelated to the children's need for permanent familial attention, and given that the Delaware statutory scheme requires that the trial court consider the best interest of the children, there is no basis to challenge that the State acted in the best interest of the children here and no constitutional basis to assert that independent counsel is required.

III. Extraordinary Standards of Proof Are Not Required in TPR Proceedings Because of the Competing Interests of the Children.

The children have the same or a greater stake in the outcome of TPR proceedings than their parents. Consequently, application of the standard of proof sought by the appellants in the state courts—beyond a reasonable doubt—would constitute a denial of due process to the children. Indeed any standard other than a preponderance of the evidence would violate the children's rights.[58]

58. The standard of proof in most civil proceedings in Delaware is a preponderance of the evidence. Warwick v. Addicks, 157 A. 205 (Del. Super. 1931). In fact the IAJ/ABA Juvenile Justice Standards Project Standards Relating to Abuse and Neglect, 1977 Tentative Draft cited by the parents and *Amici* National

The requirements of the Due Process Clause in TPR proceedings, like any other application, are not rigid and inflexible. The appellee, of course, agrees that the freedom to maintain a natural family is a liberty interest protected by the Due Process Clause. *See, e.g., Cleveland Board of Education v. LaFluer,* 414 U. S. 632, 639-40 (1974); *Meyer v. Nebraska,* 262 U. S. 390 (1923). However, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U. S. 471, 481 (1972). The specific dictates of the Due Process Clause in any given situation involve consideration of certain distinct factors, including the private interests which will be affected. *Matthews v. Eldridge,* 424 U. S. 319, 335 (1976). The nature of the competing interests governs the standard of proof applied. One of the private interests involved here—that of the children—requires that any standard of proof other than a preponderance of the evidence be avoided.

The standard of proof is used to allocate the risk of error between the litigants. *Addington v. Texas,* 441 U. S. 418 (1979). In classes of cases where an erroneous verdict generally has no more serious consequences for either party, the preponderance of evidence is applied as the standard of proof. *In re Winship,* 397 U. S. 358, 371 (1970) (Harlan, J., concurring). Thus, unless one class of litigants will be more substantially injured by an erroneous decision than the competing class of litigants, the preponderance of evidence is the appropriate standard to apply. The standard of proof in TPR proceedings, therefore, turns on the relative weight of the interests of the parties.

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58. (Cont'd.)
Assn. of Counsel for Children et al., and American Civil Liberties Union would apply the "clear and convincing" test only *against* the parent when he was put to the task of rebutting a showing that parental rights should be terminated. *See* Standard 8.3.

The interests of the children require that the preponderance of evidence standard be applied in TPR proceedings. Although the state is the nominal party in such proceedings, it represents the interests of the children. *See Stanley v. Illinois,* 405 U. S. 645 (1972).[59] The state has a transcendent interest in protecting the welfare of its minor children. *Ginsberg v. New York,* 390 U. S. 629, 641 (1968). It is these interests which entail the right to a stable life free from physical and emotional abuse and neglect—which are at least equal to (if not paramount to) the interests of the parent.[60] J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child,* 105-111 (1973). Indeed the *Alsager* court explicitly noted that it was not concerned with the child's rights vis-a-vis the parents. *Alsager v. District Court,* 406 F. Supp. 10, 16 fn. 3 (S. D. Iowa 1975).

There is no rational basis to conclude that the interests of the parents are so superior to those of the children so as to require an extraordinary standard of proof before their extinction. Whatever due process safeguards attach to these parental interests, they become attenuated when those interests are opposed by the interests of the children. *See Smith v. Organization of Foster Families,* 431 U. S. 816 (1977). Necessarily this is always the case in contested TPR proceedings. A weighing of the relative

59. At no time have the appellants contested the right of the state to terminate parental rights in appropriate cases. Although appellants may contest the conclusion drawn by the Delaware courts in this case, they do not contest the authority of the state to seek to protect the children's interests.

60. Certainly the interests of abused and neglected children are adverse to those of the parents who desire to maintain the already fractured familial relationship. *See* Smith v. Organization of Foster Families, 431 U. S. 816, 857 n. 1 (1977) (Stewart, J., concurring) (foster children may have interests adverse to foster parents in decision to relocate foster children).

importance of the parental interests vis-a-vis the interests of the children is properly a legislative function. Thus state statutory schemes requiring or permitting TPR applications to be decided on the basis of the preponderance of the evidence represent a legislative determination that the interests of the parents are not paramount to those of the children. *In re Hernandez,* 53 Ariz. App. 32, 530 P. 2d 389 (1975); *Matter of N. J. W.,* 273 N. W. 2d 134, 139-140 (So. Dak. 1978).[61]

Appellants virtually ignore the interests of the children. The only "interest" which they articulate is that the child has a "common interest" in remaining with his parents. They cite *Woodby v. Immigration and Naturalization Service,* 385 U. S. 276 (1966) involving extraordinary standard of proof. The case, however, has little or no relationship to the instant matter. It involves the balancing of the interests of an individual litigant against those of society as a whole. But in TPR proceedings the interests to be balanced are not diffused among the general public; they are the interests of the children who have a direct and immediate stake in the outcome of the proceeding.

Despite the parents' attempt to dismiss it in a footnote, (Brief for Appellants p. 27 fn. 47) this Court has recently approved of the preponderance rule in loss of citizenship cases. *Vance v. Terrazas,* 48 U. S. L. W. 4069 (Jan. 15, 1980). As the regulation of the parent-child relationship is a matter of State rather than federal legislative concern, the failure of the Delaware General Assembly

61. The legislative branch is free to make such policy decisions. In Woodby v. Immigration and Naturalization Service, 385 U. S. 276 (1966), the Court applied a clear and convincing standard of proof only after determining that "Congress has not addressed itself to the question of what degree of proof is required in deportation proceedings." 385 U. S. at 284.

to require a greater standard than a preponderance of the evidence should be given great weight here, as it was by the Delaware Supreme Court.

Even if the parents' failure really to consider the interests of the children is overlooked, their argument is still unpersuasive. Appellants place primary emphasis on *Addington v. Texas,* 441 U. S. 418 (1979) to support their claim that the state must prove the children's case beyond a reasonable doubt in TPR proceedings.[62] *Addington* refused to apply that standard for several reasons which are applicable here.

First, the *Addington* Court noted that in a civil commitment state power is not exercised in a punitive sense. Likewise, TPR proceedings are not conducted to punish the parent; rather they are expressly intended to protect the interests of the child.

Second, the Court also found that the inquiry in a commitment proceeding is very different from that in a criminal proceeding. In criminal cases the standard is straight-forward: did the accused commit the crime alleged. But the Court noted that in civil commitment pro-

62. Throughout the course of the state court proceedings, appellants consistently argued that "beyond a reasonable doubt" was the appropriate standard; they never argued that a lesser extraordinary standard of proof, such as "clear and convincing", was appropriate. The substance of appellant's arguments are reflected in the Delaware Supreme Court's opinion, which considered only the beyond a reasonable doubt standard. Quite properly, the Delaware courts never considered the clear and convincing standard since appellants never argued in favor of its adoption.

Appellants did not expressly urge the adoption of the clear and convincing standard in their Jurisdictional Statement. They just articulate it here and it should be rejected since it has never been fairly presented to the state courts.

Appellee hastens to emphasize, however, that the interests of the children require rejection of any extraordinary standard of proof.

ceedings, the inquiry is not so clear. Given the lack of certainty and the fallibility of psychiatric diagnosis, the Court concluded that it was doubtful a state could ever prove its case beyond a reasonable doubt. Similarly, given the necessity for subjective evaluations in TPR proceedings it would be impossible for a state to prove the children's case beyond a doubt. Thus, the sought-after standard would completely frustrate any statutory scheme permitting termination of parental rights.

IV. The Termination Proceedings Do Not Constitute a Denial of Substantive Due Process.

Appellants now contend[63] that substantive due process requires that the state establish a compelling state interest before terminating their parental rights. This argument misapprehends the due process clause; the state need only establish that termination is reasonably related to a legitimate state purpose. Moreover, the evidence in this case clearly establishes a compelling state interest in the termination of the parent's rights.

Previous decisions of this Court indicate that the compelling state interest test is not applicable here. Rather the test is whether the termination is reasonably related to a legitimate state purpose. In *Pierce v. Society of Sisters,* 268 U. S. 510 (1925) the Court considered the validity of a state statute requiring children to attend

63. During the course of the proceedings in the state courts, appellants did not make any substantive due process argument. The substantive due process arguments now presented to this Court were not timely made to the Delaware Supreme Court. Appellants did not even mention substantive due process until after the Delaware Supreme Court had issued its opinion when they filed their motion for reargument. The Appellant's brief accompanying that motion includes 1 and ½ pages of argument pertaining to substantive due process. Since it was presented for the first time on a motion for reargument it was not fairly raised in the state courts.

public schools.[64] The statute was challenged, *inter alia,* on the ground that it interferred with the family relationship. The Court responded by applying the reasonable relationship test. It wrote:

> Under the doctrine of *Meyer v. Nebraska,* 262 U. S. 390, 43 Sup. Ct. Rep. 625, 67 L. Ed. 1042, 29 A. L. R. 1146, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, *rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.* (268 U. S. at 534-5) (emphasis added).

The significance of *Pierce* was underscored in *Wisconsin v. Yoder,* 406 U. S. 205 (1972) wherein the Court sustained a free exercise challenge by Amish parents who refused to send their children to public or private school. In arriving at its conclusion, the Court recognized that ordinarily a reasonable relationship to some legitimate state purpose is required for a state to interfere with a familial relationship. However, the Court distinguished the case then before it solely on the basis that it also included a First Amendment claim.[65] No such claim is

64. Pierce has been characterized as "perhaps the most significant (statement) of the Court in this area. . . ." Wisconsin v. Yoder, 406 U. S. 205, 232 (1972).

65. The Yoder Court wrote in pertinent part:

> [W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment. (406 U. S. at 233).

presented here. It is therefore clear from *Yoder* that the reasonable relation test is applicable here.

It is beyond question that the welfare of children is a legitimate concern of the state. *See, e.g., Ginsberg v. New York,* 390 U. S. 629 (1968). This Court has recognized that the severance of a familial relationship may be necessary to preserve the welfare of a child. *Stanley v. Illinois,* 405 U. S. 645 (1972) (dictum). *Smith v. Organization of Foster Families,* 431 U. S. 816 (1977) (dictum). Thus termination proceedings are reasonably related to a legitimate state purpose.

The question thus is whether the termination in the instant case bears a reasonable relationship to the welfare of the children. The record manifests such a relationship. Appellants' contention that no harm was done to these children is false. The record of the five-day proceedings in this case indicates that the parents had shown themselves to be incapable of providing these children with any sort of stable, nurturing environment. These parents made nineteen changes of residence between eleven different localities within a two-year period. Many of these residences were with other families in grossly over-crowded housing arrangements. The father was shown to have sexually toyed with his four-year-old daughter, resulting in a conviction for offensive touching. The two eldest children were in a voluntary foster placement for an extended period of time prior to the birth of the third child. The parents were engaged in an ongoing incestuous relationship throughout the case.

It can clearly be seen from these facts and the rest of the record that the mental, emotional and physical health of these children would have been placed in serious jeopardy had their parents' rights not been terminated. The State took repeated action to attempt to improve the children's living conditions prior to termination. Fi-

nally, termination proceedings were instituted to ensure these children the greatest possibilities for maximum continuity of personal relationships, surroundings and environmental influences. Had it not terminated these rights, the children would most probably have been placed in prolonged foster care, while their parents attempted to resolve their problems which they had made no inroads against during the three years prior to the TPR. The detriment to children caused by the continued impermanence and uncertainty in their placement seems obvious. J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests of the Child* (1973).

The showing in the state courts and the principles applied by those courts comport with the substantive requirements of due process. In *Smith v. Organization of Foster Families,* 431 U. S. 816 (1977), Mr. Justice Stewart espoused the following view in a concurring opinion:

> If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'

(431 U. S. at 862-3) (Stewart, J., concurring). This view was later adopted by the full court in *Quilloin v. Walcott,* 434 U. S. 246, 255 (1978) (dictum). In the instant case the state courts have required and found a showing of unfitness of the parents. This showing establishes a reasonable relationship between the termination and a legitimate state purpose. Thus, the requirements of the Due Process Clause are satisfied.

CONCLUSION

For the reasons stated herein the judgment of the Supreme Court of Delaware should be affirmed; or the order noting probable jurisdiction should be vacated and the appeal dismissed or affirmed.

If, however, the Court reverses the judgment of the Supreme Court of Delaware, such action should have prospective effect only.

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APPENDIX A

13 *Del. Code* § 1103(4) REPEALED

The procedure for termination of parental rights for the purpose of adoption or, if a suitable adoption plan cannot be effected, for the purpose of providing for the care of the child by some other plan which may or may not contemplate the continued possibility of eventual adoption, may be initiated whenever it appears that:

. . .

(4) The parent or parents of any such child, or person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights. . . .

APPENDIX B

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13 *Del. Code* § 1103(5)

The procedure for termination of parental rights for the purpose of adoption or, if a suitable adoption plan cannot be effected, for the purpose of providing for the care of the child by some other plan which may or may not contemplate the continued possibility of eventual adoption, may be initiated whenever it appears that:

. . .

(5) The parent or parents of any child, or any person holding parental rights over such child are not able, or have failed, to plan adequately for the child's physical needs or his mental and emotional health and development and:

a. In the case of a child in the care of an authorized agency:

1. The child has been in the care of an authorized agency for one year, or there is a history of previous placement or placements of this child, or a history of neglect, abuse, or lack of care of other children by this parent, and

2. The conditions which led to the child's placement still persist, and there appears to be little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future.

b. In the case of a child in the home of a stepparent or blood relative:

1. The child has resided in the home of the stepparent or blood relative for a period of at least one year, and

2. The Court finds the non-custodial parent or parents incapable of exercising parental responsibilities, and that there appears to be little likelihood such parent or parents will be able to exercise such parental responsibilities in the foreseeable future."

APPENDIX C

31 *Del. Code* c. 38 (1979 Interim Supp.)

§ 3801. Purpose.

It is determined that an independent monitoring system to identify and periodically review children in foster care in the State is in the best interests of the health and welfare of all citizens of Delaware. It is the purpose of this chapter to provide such a system in order to insure continuing efforts to obtain permanent homes for children; to acknowledge that the time perception of children differs from that of adults; to provide stability in the lives of children who must be removed from their homes; and to make the ongoing needs of a child for proper physical, mental, and emotional growth and development the decisive considerations in permanency planning.

§ 3802. Definitions.

(a) "Placement agency" shall mean the Division of Social Services and any agency, organization or institution engaged in the placement of children in foster care in this State.

(b) "Child" shall mean any child who has been placed in the custody or care of the Division of Social Services or any other placement agency by court order, or placed voluntarily in a private placement agency for more than 1 year.

§ 3803. Foster Child Review Board—Established; composition; terms; appointment; removal; vacancies.

(a) There is hereby established a Delaware Foster Child Review Board. For administrative purposes, the Board shall be within the Administrative Office of the Courts.

(b) The Board shall consist of 21 members, of whom 1 shall be the Chairman. No more than 11 Board members shall be registered members of the same major political party. When appointed, a Board member shall be a citizen of the United States and a resident of this State for at least 1 year immediately preceding the appointment. Four members shall reside in the City of Wilmington, 4 members shall reside in the remainder of New Castle County, 4 members shall reside in Kent County, 4 members shall reside in Sussex County and 5 members shall reside anywhere within this State.

(c) Seven of the original members of the Board shall be appointed to 3-year terms, 7 of the original members of the Board shall be appointed to 2-year terms and 6 of the original members of the Board shall be appointed to 1-year terms. At the expiration of the terms of the original members of the Board, all appointments shall be for 3 years. A member shall continue to serve until his successor is appointed by the Governor.

(d) The Governor shall appoint the Chairman and members of the Board. The Chairman will serve at the Governor's pleasure. The Governor shall appoint replacements for the unexpired term only.

§ 3804. Same—Meetings.

The Board as a whole shall meet at least 2 times per year and shall annually elect such officers as are necessary from among its members.

§ 3805. Same—Compensation and expenses for members.

Each member of the Board shall receive, upon request, reimbursement for necessary expenses to

attend meetings. Such expenses may not exceed the mileage rate paid to state employees, per mile actually travelled, or the cost of public transportation and no more than $10 per meeting for other miscellaneous expenses.

§ 3806. Same—Qualifications of members.

(a) Board members shall be citizens who have demonstrated an interest in children and their welfare through community service or professional experience, or possess a background in law, sociology, psychology, psychiatry, education, theology, social work, medicine or related fields.

(b) No person employed by the Division of Social Services, any placement agency or Family Court of the State may be appointed to the Board.

(c) There shall be no discrimination in appointment of Board members on the basis of sex, socio-economic, racial or ethnic factors.

§ 3807. Same—Powers.

The Board shall have the power and authority to:

(1) Adopt rules and regulations consistent with the purpose and provisions of this chapter and with applicable federal and state laws, subject to the Administrative Procedures Act, Chapter 64 of Title 29.

(2) Designate an Executive Committee which may act between meetings of the Board, subject to confirmation of its decisions by a quorum of the Board, which Executive Committee shall consist of not less than 5 members of the Board and shall be chaired by the Chairman of the Board.

(3) Employ, supervise and evaluate an Administrative Coordinator, who shall serve as chief administrator, to properly implement and administer this chapter, subject to budget restraints.

(4) Advise the Administrative Coordinator on the establishment of training, with periodic in-service training, of the Board.

(5) Monitor and evaluate the effectiveness of the implementation of this chapter.

(6) Review and analyze reports on the status of all children in foster care, which reports shall be provided at least quarterly by the placement agencies. The first reports shall be provided within 180 days of July 13, 1979. Such reports are to include information concerning the number of children entering and leaving foster care during each quarter.

(7) Provide advice to placement agencies concerning the kind of information which should be maintained and provided by said agencies to assist in the review and monitoring of the foster care system.

(8) Consult with placement agencies and other entities as appropriate in arriving at policies and procedures in order that the maximum amount of coordination and cooperation may be achieved between the Boards and organizations which are involved in foster child care.

(9) Approve the Administrative Coordinator's annual budget request and other applications for funds from any sources.

(10) Make recommendations to the Governor, the Chief Justice of the Supreme Court of the State and the General Assembly, concerning resources, policies, procedures and statutes which affect the goal of permanency for children.

(11) Make a written annual report on the effectiveness of this chapter to the Governor, the Chief Justice of the Supreme Court of the State and the General Assembly, which shall be available to the general public upon request.

§ 3808. Same—General responsibilities for case review.

(a) The Board is hereby authorized to select annually a representative sample of the foster care caseloads of placement agencies for individual review, subject to the following:

(1) A maximum of 400 reviews per year may be conducted.

(2) The number of reviews from each placement agency's caseload is to be proportionate to that agency's percentage of the total.

(3) The Board may review an individual child's case twice yearly.

(4) The Board shall begin reviewing cases effective July 1, 1980.

(b) The Board is authorized to divide itself into committees of not less than 5 members for the purpose of reviewing the cases of individual children in foster care.

(c) The purposes of case review are as follows:

(1) To submit review reports with findings and recommendations to the placement agency and participating parties.

(2) To encourage and facilitate movement toward the return of a child to his or her parents or guardian or initiation of termination of parental rights proceedings.

(3) To encourage stable, long-term foster care in the event that return to the parents or guardian or termination of parental rights is not possible, feasible or in the best interest of the child.

(4) To encourage and facilitate stability in foster care by urging fewer changes in placement per child and by urging good foster parent recruitment procedures.

(5) To assist placement agencies with dissemination of information about the rights and responsibilities of biological parents, foster parents and other interested parties in regard to a child in foster care.

(6) To make recommendations to the Board regarding foster care policies and procedures.

§ 3809. Same—Review procedures.

(a) The review procedures for the Board shall include consideration and evaluation of such matters as:

(1) The goal of the permanent placement plan.

(2) Services to the child and others involved.

(3) Placement of siblings.

(4) Length of time spent in foster care.

(5) Number of placements.

(6) Whether the child's wishes were considered, where appropriate.

(7) Efforts made to fulfill the permanent placement plan by all involved.

(8) The opportunity to have and participate in regular visits with the child by the biological parents or legal guardian.

(9) Whether there are obstacles which hinder or prevent attainment of the placement goal.

(b) Any Board member who has personal knowledge of, or is acquainted with, any of the principals in a case shall disqualify himself or herself from reviewing that case.

(c) Meetings at which individual cases are discussed or reviewed shall not be subject to § 10004 of Title 29.

(d) Records of the Board which pertain to individual cases and review thereof shall be exempt from Chapter 100 of Title 29.

§ 3810. Notice of review.

The Board shall send out written notices of a schedules review at least 30 days in advance to the following, who may appear at the review session:

(1) The placement agency;

(2) The child, where appropriate;

(3) Parents or legal guardian;

(4) Foster parents;

(5) Child's attorney, if applicable; and

(6) Any person or agency interested in or having knowledge or information about the child.

§ 3811. Records of review.

(a) At least 7 days before each child's review, the placement agency shall submit to the Administrative

coordinator the child's permanent placement plan and a written report on the progress towards implementation of such plan.

(b) Subject to legal requirements, placement agencies are obligated to provide the Board with information needed for review, in addition to the information supplied in subsection (a) of this section. The Board may petition the Family Court for a hearing if it is refused records which it believes it should have under this section.

§ 3812. Confidentiality of records.

(a) All records and information in the possession of the Division of Social Services, any placement agency or the Board, regarding children and their parents or relatives, shall be deemed confidential, and shall be disclosed only pursuant to this chapter.

(b) Violation of this section is a class C misdemeanor. The Superior Court shall have jurisdiction over violations of this section.

(c) Any member of the Board or the administrative staff of the Board who violates these provisions and improperly discloses confidential information shall immediately be removed or dismissed.

§ 3813. Recommendations.

The Board shall submit a written report of the review, within fifteen days, to the placement agency and other participating parties. This report shall offer findings and recommendations such as:

(1) Return of the child to his or her parents or guardians.

(2) Adoption of the child.

(3) Initiation of termination of parental rights proceedings.

(4) Continued foster care placement is best and permanent placement plan is appropriate.

(5) Continued foster care placement is best, but permanent placement plan is not appropriate.

§ 3814. Petition for judicial hearing.

(a) Upon receipt of the review report required by § 3813 of this title, the placement agency shall inform the Board within 10 days of any disagreement with the Board's recommendations, in which case the Board or other participating parties may petition the Family Court within 15 days for a judicial hearing. If the agency fails to advise the Board of such disagreement, it shall be presumed that the agency agrees with the recommendations of the Board and will act accordingly.

(b) The Board may petition the Family Court for a judicial hearing if there has been no documented action toward achievement of a permanency plan during a 1-year period.

§ 3815. Notice of hearing.

A judicial hearing by the Family Court of the State shall be held upon petition by the Board or participating party, within 45 days after filing date of such petition. The Court shall send written notification of such hearing at least 15 days in advance to:

(1) The placement agency;

(2) The Administrative Coordinator;

(3) The child, where appropriate;

(4) The parents or legal guardian;

(5) The foster parents;

(6) The child's attorney, where applicable; and

(7) Other interested or involved persons.

§ 3816. Court orders.

After a judicial hearing, the Family Court of the State may enter an order:

(1) Directing the return of the child to his or her parents or guardian;

(2) Continuing placement under the current permanent placement plan;

(3) Continuing placement under a revised permanent placement plan; or

(4) Appointing an attorney to represent the child and recommend that the child's attorney initiate termination of parental rights proceedings on behalf of the child in the appropriate court of competent jurisdiction.

§ 3817. Permanent placement plan.

(a) The placement agency holding custody shall prepare, with consultation and information from the child's parents or guardian, the child's attorney if applicable and where appropriate the child, a permanent placement plan for the child. Where no placement agency holds custody, the placement agency having care of the child shall prepare the permanent placement plan.

(b) The permanent placement plan for each child shall include:

(1) The purpose for which the child was placed.

(2) The goal for permanent placement.

(3) The length of time in foster care needed to achieve the goal.

(4) A statement of duties of the placement agency, parents, legal guardian and foster parents and services to be provided by the placement agency and other service providers.

(5) The person in the placement agency directly responsible for the implementation of the permanent placement plan.

§ 3818. Administrative Coordinator.

Under the direction of the Board, the Administrative Coordinator's duties shall include, but not be limited to:

(1) Application for and administration of funds for the foster child review system.

(2) Hiring and supervising of system employees and maintaining all necessary records and files.

(3) Implementing policies and procedures of the Board and representing the Board's policies in contacts with various other agencies and organizations.

(4) Collecting necessary data and statistics in order that the Board may monitor and evaluate the effectiveness of implementation of this chapter.

(5) Supervising the day-to-day operations of the Board.

(6) Providing training programs for the Board.

(7) Conduct research and develop advocacy programs designed to improve the lives of children in foster care.

(8) Consulting the placement agencies and other appropriate parties to assure the maximum coordination and cooperation between everyone involved in foster care.

§ 3819. Timetable.

All appointments of Board members shall be made within 90 days of July 13, 1979, and the Administrative Coordinator shall be selected within 180 days of July 13, 1979.

§ 3820. Construction of chapter.

This chapter, being necessary for the welfare of the State and its inhabitants, shall be liberally construed to effect the purposes thereof.

§ 3821. Evaluation of foster care review system.

No later than 3 years after July 13, 1979, the Board, in consultation with the Department of Health and Social Services, shall retain a qualified consultant to perform an independent evaluation of the state's foster care review program, who shall, by December 1, 1982, make recommendation to the Governor and the General Assembly as to the continuation or termination of the foster care review program and the proper scope of the program, including the expansion or reduction of the number of individual case reviews.

§ 3822. Conflict with existing laws.

Any provisions of this chapter which shall cause the State to lose federal funding shall be considered null and void.